No. 17-965

IN THE
Supreme Court of the United States

DONALD J. TRUMP, ET AL.,
Petitioners,

v.

STATE OF HAWAII, ET AL.,
Respondents.

On Writ of Certiorari to the United State Court of Appeals for the Ninth Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

PETER KARANJIA
GEOFFREY BROUNELL
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., NW
Suite 800
Washington, D.C. 20006
(202) 973-4256
peterkaranjia@dwt.com

ELIZABETH B. WYDRA
BRIANNE J. GOROD
Counsel of Record
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street, NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae
(Additional Counsel on Inside Cover)

VICTOR A. KOVNER
DAVIS WRIGHT
TREMAINE
LLP
1251 Avenue of the Americas,
21st Floor
New York, NY 20020

RAYMOND H. BRESCIA
Professor of Law*
ALBANY LAW SCHOOL
80 New Scotland Ave.
Albany, NY 12208
*For affiliation purposes only

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	6
I. SEPARATION-OF-POWERS PRINCIPLES DO NOT PERMIT THE PRESIDENT TO WRITE RELIGIOUS DISCRIMINATION INTO OUR NATION'S IMMIGRATION LAWS	6
II. THE PROCLAMATION RUNS AFOUL OF THE IMMIGRATION AND NATIONALITY ACT	9
A. The Proclamation Subverts a Carefully Crafted Legislative Scheme Designed To Prevent Potential Terrorists from Entering the United States	11
B. The Proclamation Violates the INA's Categorical Prohibition on Nationality-Based Discrimination	16
III. THE PROCLAMATION RUNS AFOUL OF THE ESTABLISHMENT CLAUSE	20
A. The Text and History of the Religion Clauses Forbid Laws That Target a Disfavored Religious Minority for Discriminatory Treatment	20

TABLE OF CONTENTS – cont'd

Page

B. The Constitution's Command of Religious Neutrality Squarely Applies to Immigration Regulations 27

C. The Proclamation Violates the Central Meaning of the First Amendment..... 31

CONCLUSION 34

APPENDIX: LIST OF *AMICI* 1A

TABLE OF AUTHORITIES

Page(s)

Cases

Arizona v. United States,
567 U.S. 387 (2012) 6, 8

Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,
512 U.S. 687 (1994) 20, 25, 26, 31, 32

Boumediene v. Bush,
553 U.S. 723 (2008) 4, 6

Carlson v. Landon,
342 U.S. 524 (1952) 6

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 524 (1952) 26, 32

Clinton v. City of New York,
524 U.S. 417 (1998) 3, 4, 8, 10

Everson v. Bd. of Educ.,
330 U.S. 1 (1947) 25

Fiallo v. Bell,
430 U.S. 787 (1977) 33

Galvan v. Press,
347 U.S. 522 (1954) 6

Haitian Refugee Ctr. v. Civiletti,
503 F. Supp. 442 (S.D. Fla. 1980) 17

TABLE OF AUTHORITIES – cont'd

Page(s)

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
565 U.S. 171 (2012) 24

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 15

INS v. Chadha,
462 U.S. 919 (1983) 5, 9

Judulang v. Holder,
565 U.S. 42 (2011) 2

Kendall v. United States ex rel. Stokes,
37 U.S. (12 Pet.) 524 (1838) 9

Kent v. Dulles,
357 U.S. 116 (1958) 12

Kerry v. Din,
135 S. Ct. 2128 (2015) 4, 15

Korematsu v. United States,
323 U.S. 214 (1944) 16

Larson v. Valente,
456 U.S. 228 (1982) 5, 25

Lee v. Weisman,
505 U.S. 577 (1992) 23, 25, 31

Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State,
45 F.3d 469 (D.C. Cir. 1995) 16, 18

TABLE OF AUTHORITIES – cont'd

Page(s)

McCreary Cty. v. ACLU of Ky.,
545 U.S. 844 (2005) 23, 32

Medellín v. Texas,
552 U.S. 491 (2008) 9

Nat'l Fed'n of Indep. Bus. v. Sebelius,
567 U.S. 519 (2012) 33

Town of Greece v. Galloway,
134 S. Ct. 1811 (2014) 5, 23, 24, 25

Trinity Lutheran Church v. Comer,
137 S. Ct. 2012 (2017) 26

United States v. Midwest Oil Co.,
236 U.S. 459 (1915) 8

United States v. Williams,
553 U.S. 285 (2008) 10

United States v. Witkovich,
353 U.S. 194 (1957) 12

Util. Air Regulatory Grp. v. EPA,
134 S. Ct. 2427 (2014) 10, 16

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 4, 7, 16

Zadvydas v. Davis,
533 U.S. 678 (2001) 33

Zivotofsky ex rel. Zivotofsky v. Kerry,
135 S. Ct. 2076 (2015) 7

TABLE OF AUTHORITIES – cont'd

Page(s)

Constitutional Provisions

U.S. Const. amend. I 22

U.S. Const. art. I, § 8, cl. 3 7

U.S. Const. art. I, § 8, cl. 4 ..... 6, 7

U.S. Const. art. I, § 8, cl. 10 7

U.S. Const. art. I, § 8, cl. 11 7

U.S. Const. art. VI, cl. 3 21

Statutes

8 U.S.C. § 1151(b)(2)(A)(i) 18

8 U.S.C. § 1152(a)(1)(A) 4, 16, 18

8 U.S.C. § 1153 18

8 U.S.C. § 1182(a) 9

8 U.S.C. § 1182(a)(1)(A) 9

8 U.S.C. § 1182(a)(2) 9

8 U.S.C. § 1182(a)(3)(B) 4, 9

8 U.S.C. § 1182(a)(3)(B)(i) 12, 13, 15

8 U.S.C. § 1182(a)(4) 9

8 U.S.C. § 1182(f) 10, 15

8 U.S.C. § 1187 13

TABLE OF AUTHORITIES – cont'd

Page(s)

8 U.S.C. § 1187(a)(12)(A) 18

8 U.S.C. § 1735(a) 13

Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, 129 Stat. 2989, Div. O, § 203 (codified at 8 U.S.C. § 1187(a)(12)) 13, 14

Executive Branch Materials

50 Fed. Reg. 41329 (Oct. 10, 1985) 19

51 Fed. Reg. 30470 (Aug. 26, 1986) 19

71 Fed. Reg. 28541 (May 16, 2006) 19

Proclamation 2523, 6 Fed. Reg. 5821 (Nov. 14, 1941) 11

Legislative Materials

Act of 1646: Heresie Error, *in Colonial Laws of Massachusetts* (William H. Whitmore ed., 1889) 29

Act of 1715, ch. XXXVI, § 7, *in* Thomas Bacon, *Laws of Maryland at Large* (1765) 29

Act of 1717, ch. X, § 1, *in* Thomas Bacon, *Laws of Maryland at Large* (1765) 30

Act of 1732, ch. XXIII, *in* Thomas Bacon, *Laws of Maryland at Large* (1765) 30

TABLE OF AUTHORITIES – cont'd

Page(s)

1 Annals of Cong. (1789) (Joseph Gales ed., 1834) 25

Combatting Terrorist Travel: Does the Visa Waiver Program Keep Our Nation Safe?, Hearing on H.R. 158 Before the Subcomm. On Border & Maritime Security of the H. Comm. on Homeland Security, 114th Cong. (2015) 14

161 Cong. Rec. H9054 (Dec. 8, 2015) 14

2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 2d ed. 1836) 20, 25, 26, 31, 32

4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 2d ed. 1836) ..... *passim*

Grand Assembly, Mar. 13, 1659-60, Act VI, *in* 1 Hening, *The Statutes at Large, Being a Collection of All the Laws of Virginia* (1809) 29

Hearings Before the Subcomm. No. 1 of the H. Comm. on the Judiciary on H.R. 2580 to Amend the Immigration and Nationality Act, and for Other Purposes, 89th Cong. (1965) 17

H.R. Conf. Rep. No. 100-475 (1987) 11

TABLE OF AUTHORITIES – cont'd

Page(s)

H.R. Rep. No. 89-745 (1965) 17

H.R. Rep. No. 114-369 (2015) 13

Thomas Jefferson, Virginia Act for Establishing Religious Freedom, ch. XXXIV (Oct. 1785), *in* 12 William Walter Hening, *The Statutes at Large, Being a Collection of All the Laws of Virginia* (1823) 23

Kentucky Resolutions of 1798, *in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 2d ed. 1836) 3

1 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1911) 8

2 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1911) 6

Second Charter to the Treasurer and Company for Virginia, § XXIX (May 23, 1609), *in* 1 William Walter Hening, *The Statutes at Large, Being a Collection of All the Laws of Virginia* (1809) 28

Other Authorities

1 *The Colonial Records of the State of Georgia* (Allen D. Candler ed., 1904) 30

TABLE OF AUTHORITIES – cont'd

Page(s)

The Federalist No. 47 (Madison) (Clinton Rossiter ed., rev. ed. 1999) 8

Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346 (2002) 22

Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill (Oct. 3, 1965) 17

Letter from George Washington to the Hebrew Congregation in Newport, R.I. (Aug. 18, 1790) 24, 31

James Madison, *Memorial and Remonstrance Against Religious* Assessments, *in* 2 *The Writings of James Madison* (Robert Rutland et al. eds., (1977) 5, 23, 27

James Madison, Speech at the Virginia Ratifying Convention (June 12, 1788), *in* 11 *The Papers of James Madison* (Robert Rutland et al. eds., 1977) 20

Kate M. Manuel, Cong. Research Serv., Executive Authority to Exclude Aliens: In Brief (Jan. 23, 2017) 19

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003) 24, 27, 28, 30

TABLE OF AUTHORITIES – cont'd

Page(s)

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) 21, 27

Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. Ill. L. Rev. 173 (1998) 8

Joel A. Nichols, *Religious Liberty in the Thirteenth Colony: Church-State Relations in Colonial and Early National Georgia*, 80 N.Y.U. L. Rev. 1693 (2005)..... 30

Notes on the Debates in the Pennsylvania Convention Taken by James Wilson, reprinted in Pennsylvania and the Federal Constitution, 1787-1788 (John Bach McMaster & Frederick Dawson Stone eds., 1888)..... 22

Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons*, Cato Inst.: Cato at Liberty (Jan. 26, 2017)..... 33

Press Release, U.S. Dep't of Homeland Sec., *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016) 14

TABLE OF AUTHORITIES – cont'd

Page(s)

Records of the Colony or Jurisdiction of New Haven (Charles J. Hoadly ed., 1858)..... 29

Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259 (2009) 8

U.S. Dep't of State, *Presidential Proclamations*, https://perma.cc/M2RL-6775 (last visited Sept. 12, 2017)..... 18

U.S. Dep't of State, *Visa Waiver Program*, https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html (last visited Aug. 9, 2017)..... 13

INTEREST OF *AMICI CURIAE*[1]

Amici are members of Congress who are familiar with the Immigration and Nationality Act and other laws passed by Congress related to immigration and national security concerns, as well as the interplay between those laws and constitutional guarantees. *Amici* are committed to ensuring that our immigration laws and policies both help protect the nation from foreign and domestic attacks and comport with fundamental constitutional principles, including the First Amendment. *Amici* are thus particularly well-situated to provide the Court with insight into the limitations that both the Constitution and federal immigration laws impose on the Executive Branch's discretion to restrict admission into the country, and they also have a strong interest in seeing those limitations respected.

A full listing of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

The First Amendment reflects our Founding promise that "no sect here is superior to another." 4

---

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

The Debates in the Several State Conventions on the Adoption of the Federal Constitution 194 (Jonathan Elliot ed., 2d ed. 1836) ("*Elliot's Debates*"). Consistent with this heritage of religious liberty, our nation's immigration laws regulate entry based on an individualized assessment of an individual's "fitness to reside in this country," *Judulang v. Holder*, 565 U.S. 42, 53 (2011), not on the basis of religious belief.

In a Presidential Proclamation (the "Proclamation") issued on September 24, 2017—the third such order issued since President Trump took office—the President seeks to rewrite our immigration laws to categorically prohibit immigration into the United States by nationals of seven countries: Iran, Libya, Syria, Yemen, Somalia, Chad, and North Korea, virtually all countries with overwhelmingly Muslim populations. The sole exception—North Korea, which sent fewer than 100 nationals, including many diplomats, to the United States last year—is entirely symbolic. The Proclamation also prohibits the issuance of non-immigrant visas to nationals from Syria and North Korea, certain non-immigrant visas to nationals of Iran, Libya, Yemen, and Chad, and business and tourist visas to a tiny number of Venezuelan government officials.

The Proclamation purports to be data-driven, focused on countries that failed to comport with information-sharing and identity management protocols. But the Proclamation was jerry-rigged to target Muslims. Numerous countries failed to meet one or more of the Proclamation's criteria, but were not included in its travel ban. Somalia, a Muslim-

majority nation, satisfied the information-sharing criteria, but was nevertheless subjected to the ban; Venezuela, which is less than 1% Muslim, failed the same criteria, but its nationals—other than a small number of government officials—are permitted to travel to the United States. Like its predecessors, the Proclamation targets Muslim-majority nations; it imposes a religiously gerrymandered test for immigration. All told, the Proclamation excludes over 150 million individuals from the United States—overwhelmingly from Muslim-majority nations—and prevents U.S. citizens and others from sponsoring and reuniting with relatives from the targeted countries. The Proclamation reflects President Trump's view that "there is great hatred towards Americans by large segments of the Muslim population" and that "Islam hates us." J.A. 120.

The Proclamation cannot be squared with our Constitution's system of separation of powers. Our nation revolted in opposition to the tyrannical rule of a king, and the Framers of our Constitution took pains to deny the President the power to both make the law and then execute it, recognizing that such concentrated power "in the hands of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). The Framers gave the legislative power, including the authority to make rules concerning immigration, to Congress, ensuring that control of our borders would not be left to the "absolute dominion of one man." Kentucky Resolutions of 1798, *in* 4 *Elliot's Debates* 543.

Congress chose to delegate a limited portion of these powers to the Executive in the Immigration and Nationality Act ("INA"). The government's defense of the Proclamation principally rests on Section 212(f) of that statute, but that section does not give the President the power to override the parts of the INA he dislikes in favor of his own preferred policy. That is what he has done here. By treating all persons from the designated Muslim-majority countries as potential terrorists, the Proclamation overrides Congress's carefully chosen, "specific criteria for determining terrorism-related inadmissibility," *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring); 8 U.S.C. § 1182(a)(3)(B), and flouts Congress's explicit prohibition against discrimination on account of "nationality, place of birth, or place of residence," *id.* § 1152(a)(1)(A), in the issuance of immigrant visas. In short, the Proclamation "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952).

Incredibly, the government says that no court can review the President's arrogation of legislative power. But "[a]bdication of responsibility is not part of the constitutional design." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring). The President may not switch the Constitution's separation of powers "on or off at will." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008). "Executive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it; and if

that authority is exceeded it is open to judicial review." *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983).

Even if the Proclamation fell within the President's delegated authority—which it does not—it would still violate the First Amendment. Centuries ago, James Madison observed that "the first step . . . in the career of intolerance" is to place "a Beacon on our Coast," warning the "persecuted and oppressed of every Nation and Religion" that they must "seek some other Haven." James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 *The Writings of James Madison* 188 (G. Hunt ed., 1901). The First Amendment prevents official disapproval of a religious minority, "secur[ing] universal religious liberty, by putting all sects on a level—the only way to prevent persecution." 4 *Elliot's Debates* 196. Where, as here, the government "classif[ies] citizens based on their religious views" and "single[s] out dissidents for opprobrium," *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014), it violates the "clearest command of the Establishment Clause": "one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Because the Proclamation is shot through with anti-Muslim animus, it violates the central meaning of the Religion Clauses.

When the Executive Branch abuses its authority, "the judicial department is a constitutional check." 2 *Elliot's Debates* 196. The best way to protect the nation's security, while also upholding foundational American values, is to respect the Constitution's fundamental protections and the laws passed by

Congress. "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene*, 553 U.S. at 798.

ARGUMENT

I. SEPARATION-OF-POWERS PRINCIPLES DO NOT PERMIT THE PRESIDENT TO WRITE RELIGIOUS DISCRIMINATION INTO OUR NATION'S IMMIGRATION LAWS.

Our Constitution entrusts Congress with "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012); *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress."). This is reflected explicitly in the Constitution's grant of power to Congress to "establish a uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, which the Framers wrote to "leave a discretion to the Legislature . . . which will answer every purpose," 2 *The Records of the Federal Convention of 1787*, at 268 (Max Farrand ed., 1911).

Of course, Congress may choose to delegate substantial powers to the Executive Branch, *see Arizona*, 567 U.S. at 396 (discussing "broad discretion exercised by immigration officials" over removal); *Carlson v. Landon*, 342 U.S. 524, 544 (1952) (delegation permissible "because the executive judgment is limited by adequate standards"), but the Executive has no independent lawmaking power over the subject of immigration. "[T]he President's power

to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown*, 343 U.S. at 587; *id.* at 655 (Jackson, J., concurring) ("The Executive, except for recommendation and veto, has no legislative power."); Resp'ts Br. 4-5.

The federal government stresses that this case involves an executive power because it implicates foreign affairs, *see* Pet'rs Br. 47-48, but the Constitution does not give the President a freewheeling grant of lawmaking authority with respect to foreign affairs, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015) ("The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."). Quite the contrary, the Constitution gives Congress the power to make laws to regulate foreign commerce with foreign nations, to define and punish offenses against the law of nations, to declare war, and, most relevant here, to establish a uniform rule of naturalization. U.S. Const. art. I, § 8, cls. 3, 4, 10, 11. "[W]hether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law." *Zivotovsky*, 135 S. Ct. at 2090; *id.* at 2115 (Roberts, C.J., dissenting) (rejecting the view that "the President" is "the 'sole organ' of the Nation in foreign affairs" and noting that "our precedents have never accepted such a sweeping understanding of executive power"). The federal government's expansive view of inherent executive power would permit the President to override huge swathes of the "extensive and complex" regime enacted by Congress for "governance of immigration

and alien status." *Arizona*, 567 U.S. at 395. That is not the Constitution the Framers wrote.

When the Framers wrote the Constitution more than two centuries ago, they gave the lawmaking power to Congress, recognizing that "the Prerogatives of the British Monarch" were not "a proper guide in defining the Executive powers." 1 *Records of the Federal Convention*, *supra*, at 65.[2] By denying the Executive lawmaking power, the Framers sought "to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring); *see The Federalist No. 47*, at 269 (Madison) (Clinton Rossiter ed., rev. ed. 1999) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."); *id.* at 271 ("[w]hen the legislative and executive powers are united in the same person or body . . . there can be no liberty" (quoting Montesquieu)).

Under these foundational principles, "[t]he Constitution does not confer upon [the President] any power to enact laws or to suspend or repeal such as the Congress enacts." *United States v. Midwest Oil*

---

[2] From the sixteenth to the eighteenth centuries, British Kings had claimed, as a royal prerogative, the power to make law without the approval of Parliament as well as the power to suspend the execution of laws enacted by Parliament. *See* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. Ill. L. Rev. 173, 178 (1998); Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 272-77, 279-81 (2009).

Co., 236 U.S. 459, 505 (1915); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (refusing to "cloth[e] the President with a power entirely to control the legislation of congress"). Rather, "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown*, 343 U.S. at 585). Thus, the President cannot make an end-run around the "single, finely wrought," "step-by-step, deliberate and deliberative process," *Chadha*, 462 U.S. at 951, 959, the Framers prescribed for lawmaking. Yet, as demonstrated below, that is exactly what the President attempts to do here.

II. THE PROCLAMATION RUNS AFOUL OF THE IMMIGRATION AND NATIONALITY ACT.

In support of its claimed authority to categorically exclude from the United States 150 million individuals, virtually all from Muslim-majority countries, the federal government principally relies on Section 212(f) of the INA. However, that provision does not give the President the breathtaking authority that the government claims.

Section 212 of the INA sets out a detailed list of "aliens" who are "ineligible to receive visas and ineligible to be admitted to the United States," 8 U.S.C. § 1182(a), because their presence would be harmful to the United States. *See id.* § 1182(a)(1)(A) (communicable disease); *id.* § 1182(a)(2) (past criminal convictions or criminal activity); *id.* § 1182(a)(3)(B) (terrorist activity); *id.* § 1182(a)(4)

(public charge). Each of these proscriptions targets individuals who have engaged in certain acts, or who have a condition that makes their entry harmful to the United States. Following that list, Section 212(f) provides that the President may deny entry to additional "aliens or . . . class[es] of aliens" based upon a finding that their "entry into the United States . . . would be detrimental to the interests of the United States." *Id.* § 1182(f).

Section 212(f)—enacted to codify wartime emergency powers—gives the President the flexibility to impose additional limits on entry into the United States in response to emergency conditions when Congress cannot act expeditiously. Read together with the rest of the section, it is a gap-filling provision, allowing the President to supplement the restrictions contained in Section 212 in response to new conditions. *United States v. Williams*, 553 U.S. 285, 294 (2008) ("[A] word is given more precise content by the neighboring words with which it is associated."). But it does not give the President the authority to supersede Congress's judgment when Congress has already considered an issue and addressed it. Section 212(f) does not give the President the equivalent of a line-item veto over the immigration laws enacted by Congress, permitting him to excise those parts of the INA he dislikes. That would "deal a severe blow to the Constitution's separation of powers," *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014), and would "enhance[] the President's powers beyond what the Framers would have endorsed," *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring).

The Proclamation exceeds the authority granted by Section 212(f). It upends Congress's carefully considered and calibrated scheme for addressing potential terrorists' abuse of our immigration laws contained in other parts of Section 212, substituting Congress's tailored restrictions with a dragnet ban that denies entry to more than 150 million individuals—virtually all from Muslim-majority countries—based on their nationality alone. This sweeping ban—which is unlike any of the tailored restrictions contained in Section 212—guts Congress's regulatory scheme and replaces it with the President's own preferred policy.

A. The Proclamation Subverts a Carefully Crafted Legislative Scheme Designed To Prevent Potential Terrorists from Entering the United States.

Section 212(f) does not give the President a blank check; rather, it must be understood against the backdrop of wartime emergency restrictions it codified. *See* Proclamation 2523, 6 Fed. Reg. 5821, 5822, ¶ 3 (Nov. 14, 1941) ("No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General."); *see also* H.R. Conf. Rep. No. 100-475, at 165 (1987) (describing the President's authority under Section 212(f) as the authority "to deny admissions by proclamation or to deny entry to aliens *when the United States is at war or during the*

existence of a national emergency proclaimed by the President" (emphasis added)). In codifying those emergency powers, Congress gave the President an important, but limited, grant of authority, ensuring that he could act quickly in emergency situations—that is, when Congress had not yet had an opportunity to consider a particular issue or class of possible entrants to the country. *See* Resp'ts Br. 38-40; *Kent v. Dulles*, 357 U.S. 116, 128 (1958) (refusing to read congressional statute to give the Executive "unbridled discretion" and instead reading it narrowly "in light of prior administrative practice"); *United States v. Witkovich*, 353 U.S. 194, 199 (1957) (refusing to read immigration statute "in isolation and literally . . . to confer upon the Attorney General unbounded authority"). But Congress did not give the President the power to override the considered judgment of Congress—a form of executive lawmaking alien to the Constitution's system of separation of powers.

Here, the President seeks to rely on this provision to deny entry to individuals on the ground that they pose a terrorist threat. But Congress has already specified in Section 212(a) several terrorism-related grounds on which an individual may be denied a visa to enter the United States. 8 U.S.C. § 1182(a)(3)(B)(i). In painstaking detail, the statute declares inadmissible any foreign national who has "engaged in," "incited," or "endorse[d] . . . terrorist activity," or "is a member of a terrorist organization." *Id.* As an additional safeguard, the statute expressly authorizes "a consular officer, the Attorney General, or the Secretary of Homeland Security" to deny entry to any visa applicant he or she "knows, or has reasonable

ground to believe, is engaged in or is likely to engage after entry in any terrorist activity." *Id.* Further, a separate provision makes citizens of countries designated as "state sponsor[s] of terrorism"—a category that includes Iran, Syria, and Sudan—ineligible for nonimmigrant visas absent a determination by the Secretary of State and Attorney General that they "do[] not pose a threat to the safety or national security of the United States." 8 U.S.C. § 1735(a).

Congress recently revisited terrorism concerns in 2015 when it passed the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, 129 Stat. 2989, Div. O, § 203 (codified at 8 U.S.C. § 1187(a)(12)). Under the previously created Visa Waiver Program ("VWP"), the Department of Homeland Security may waive the B1/B2 visa requirement for aliens traveling from 38 approved countries, permitting stays of up to 90 days for business or tourism. *See* 8 U.S.C. § 1187; U.S. Dep't of State, *Visa Waiver Program*, https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html (last visited Aug. 9, 2017). With the Visa Waiver Program Improvement Act of 2015, Congress gave the Secretary of Homeland Security the authority to temporarily suspend any VWP country if it "fails to live up to its agreement to provide terrorism-related information." H.R. Rep. No. 114-369, at 3-4 (2015). Nationals from the suspended countries are not barred from traveling to the United States; they simply must apply for and obtain a visa to do so. Despite a documented risk of terrorist travel to the United States, Congress

deliberately chose this solution as an alternative to "end[ing] this valuable program." *Combatting Terrorist Travel: Does the Visa Waiver Program Keep Our Nation Safe?, Hearing on H.R. 158 Before the Subcomm. On Border & Mar. Sec. of the H. Comm. on Homeland Sec.*, 114th Cong. 2 (2015) (statement of Rep. Candice Miller). Rather than banning entry into the United States, Congress concluded that the admission of persons from Muslim-majority nations, with proper vetting, is fully consistent with national interests. *See* 161 Cong. Rec. H9054 (Dec. 8, 2015); Resp'ts Br. 45-46.

To be sure, under the 2015 Act, nationals of VWP countries may no longer be admitted to the United States without a visa if they have traveled to certain of the countries identified in the Proclamation, or are dual-nationals of those countries, and are not subject to a specified exception. *See* Pub. L. No. 114-113, 129 Stat. 2989, Div. O, § 203; Press Release, U.S. Dep't of Homeland Sec., *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016) (designating additional countries subject to the Act's restrictions). But, again, the 2015 law does not categorically bar the entry of such travelers. Instead, its tailored remedy reinforces Congress's determination that the proper response to the threat of terrorist travel is to require that certain entrants first obtain a visa. The President seeks here to override that judgment.

The government's categorical bar on 150 million persons, virtually all from Muslim-majority countries, based on the hypothesis that they might pose a terrorist threat, thus, upends Congress's

"comprehensive and reticulated statute." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)); Resp'ts Br. 42-50. The Proclamation writes discrimination into the INA, substituting an applicant's nationality alone for Congress's detailed requirements for evaluating the risk that a visa applicant may engage in terrorist activity in the United States. It ignores the fact that Section 212(a) already requires Executive Branch officials to make individualized assessments that a noncitizen seeking to enter the United States is "likely to engage" in terrorist activity upon arriving in the country. 8 U.S.C. § 1182(a)(3)(B)(i). Where Congress drew fine lines, the President attempts to sweep with a broad brush. The result is a sweeping entry ban on more than 150 million persons that bears no resemblance to the carefully crafted limitations contained in Section 212. Section 212(f) does not give the President the authority to override these detailed, "specific criteria for determining terrorism-related inadmissibility," *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring), enacted by Congress.[3]

---

[3] The Proclamation also fails to establish that admitting individuals from the covered countries "would be detrimental to the interests of the United States," as Section 212(f) requires, 8 U.S.C. § 1182(f), because the Proclamation is predicated on a potential threat, that is, speculation that entry of the covered individuals could be detrimental to national interests. Especially when viewed against the backdrop of the robust and carefully drawn statutory provisions designed by Congress to protect the country from foreign attacks, and the searching scrutiny required of sweeping assertions of presidential power

B. The Proclamation Violates the INA's Categorical Prohibition on Nationality-Based Discrimination.

Section 212(f) also does not authorize the President to ignore Congress's categorical prohibition on nationality-based discrimination in the issuance of immigrant visas. Put differently, the President cannot use Section 212(f) to make an end-run around the congressional mandate of equality in the issuance of immigrant visas in order to keep out Muslims. "The power of executing the laws . . . does not include a power to revise clear statutory terms[.]" *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446.

The INA provides that, with certain exceptions not here relevant, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). In adopting this prohibition, "Congress could hardly have chosen more explicit language," "*unambiguously direct[ing]* that no nationality-based discrimination shall occur." *Legal Assistance for Vietnamese Asylum Seekers v.*

---

under these circumstances, *see Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring), this falls far short of the sort of definitive "find[ing]" that triggers the exclusion power granted by Section 212(f). *Cf. Korematsu v. United States*, 323 U.S. 214, 235 (1944) (Murphy, J., dissenting) ("[T]he exclusion order necessarily must rely . . . upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage . . . . It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.").

Dep't of State, 45 F.3d 469, 473 (D.C. Cir. 1995) ("*LAVAS*") (emphasis added), *vacated on other grounds*, 519 U.S. 1 (1996).

The adoption of this provision was a sharp rebuke to what had come before: a "national quota system of immigration," *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 453 (S.D. Fla. 1980), according to which "the selection of immigrants was based upon race and place of birth," H.R. Rep. No. 89-745, at 8-10 (1965). As President Lyndon Johnson recognized in signing the law, the prior immigration system "violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man." Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill (Oct. 3, 1965). Congress made the considered judgment that immigration of worthy individuals from all corners of the globe benefits the nation as a whole. *See, e.g.*, *Hearings Before the Subcomm. No. 1 of the H. Comm. on the Judiciary on H.R. 2580 to Amend the Immigration and Nationality Act, and for Other Purposes*, 89th Cong. 8-9 (1965) (statement of Attorney General Nicholas Katzenbach) (prior system "prevented or delayed" "brilliant and skilled residents of other countries . . . from coming to this country"); Resp'ts Br. 56. Thus, the 1965 ban on discrimination in immigrant visa issuance was designed to prohibit the Executive from practicing wholesale discrimination against people coming from certain countries—precisely what the Proclamation commands.

Reading Section 212(f) to allow the sort of discrimination that the Proclamation mandates

would render the later nondiscrimination provision a dead letter. *See LAVAS*, 45 F.3d at 473 ("The appellees' proffered statutory interpretation, leaving it fully possessed of all its constitutional power to make nationality-based distinctions, would render 8 U.S.C. § 1152(a) a virtual nullity."). Significantly, Congress spoke explicitly in making exceptions to Section 1152's nondiscrimination rule. For example, 8 U.S.C. § 1152(a)(1)(A) provides that the non-discrimination provision should be applied "[e]xcept as specifically provided in . . . sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title." Those provisions, in turn, permit certain preferences for, among others, immediate relatives of U.S. citizens in specified circumstances. 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153. Similarly, in other provisions of the Code, Congress expressly carved out exceptions to the Visa Waiver Program, *see id.* § 1187(a)(12)(A), thereby requiring persons from certain countries to undergo more rigorous screening. Congress did not, however, create a similar exception for Section 212(f).

Section 212(f) has never been used to enact a categorical bar on entry by all aliens from a particular nation—much less millions of individuals like those covered by the Proclamation here. *See* Resp'ts Br. 40-41. Rather, as the current Administration has recognized, Section 212(f) orders "arise from a foreign policy decision to keep *certain elements* in a given country from getting a visa." U.S. Dep't of State, *Presidential Proclamations* (emphasis added), https://perma.cc/M2RL-6775 (last visited Sept. 12,

2017).[4] The power may not be used to supersede the nondiscrimination rule that Congress added to the INA in 1965—after Section 212(f) was enacted.

* * *

In sum, the Proclamation violates the Immigration and Nationality Act and can be invalidated on that ground alone. It also violates the Establishment Clause, as demonstrated below.

---

[4] The Section 212(f) proclamations that were in effect when President Trump took office are a case in point. *See, e.g.*, 50 Fed. Reg. 41329 (Oct. 10, 1985); 71 Fed. Reg. 28541 (May 16, 2006). So too is President Reagan's 1986 proclamation concerning Cuban nationals. That proclamation, which was a response to Cuba's violation of an international agreement, was not an outright ban on the entry of Cubans. Resp'ts Br. 41. The proclamation permitted Cuban citizens to enter the United States as nonimmigrants, to the extent permissible, or as immigrants if they were immediate relatives of U.S. citizens, were entitled to other special immigrant status, or met other criteria. 51 Fed. Reg. 30470 (Aug. 26, 1986). Even after September 11, 2001, the Executive did not stray from this targeted use of Section 212(f). *See* Kate M. Manuel, Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* 6-10 & tbl.1 (Jan. 23, 2017), https://fas.org/sgp/crs/homesec/R44743.pdf.

III. THE PROCLAMATION RUNS AFOUL OF THE ESTABLISHMENT CLAUSE.

A. THE TEXT AND HISTORY OF THE RELIGION CLAUSES FORBID LAWS THAT TARGET A DISFAVORED RELIGIOUS MINORITY FOR DISCRIMINATORY TREATMENT.

Our Constitution promises religious freedom to people of *all* religions and nationalities. "The Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, and the Equal Protection Clause as applied to religion—all speak with one voice . . . : Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) (citation omitted). The text and history of the Constitution's Religion Clauses firmly prohibit the government from writing into law discrimination against any one set of religious believers. The Constitution's declaration that "no sect here is superior to another," 4 *Elliot's Debates* 194, reflects the Framers' understanding that "freedom [of religion] arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society." James Madison, Speech at the Virginia Ratifying Convention (June 12, 1788), *in* 11 *The Papers of James Madison* 130 (Robert Rutland et al. eds., 1977). By commanding a course of religious neutrality, the Framers sought to free our nation "from those persecutions . . . with which other countries have been torn." 4 *Elliot's Debates* 194.

The original Constitution prohibited all religious tests for federal office, providing that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const. art. VI, cl. 3. The Framers' "decision to ban religious tests was a dramatic departure from the prevailing practice in the states, eleven of which then banned non-Christians and at least four of which banned non-Protestants from office." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1474 (1990). The Framers insisted that this kind of official discrimination against disfavored religious beliefs had no place in the Constitution.

In the North Carolina ratifying convention, James Iredell explained that the ban on religious tests "is calculated to secure universal religious liberty, by putting all sects on a level—the only way to prevent persecution." 4 *Elliot's Debates* 196; *id.* at 208 ("No sect is preferred to another. Every man has the right to worship the Supreme Being in the manner he thinks proper."). These founding principles ensure religious liberty for all believers of any religion without exception. As Iredell observed, "it is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?" *Id.* at 194.

In the Massachusetts ratifying convention as well, supporters of the Constitution stressed that the

United States was conceived as a "great and extensive empire," where "there is, and will be, a great variety of sentiments in religion among its inhabitants." 2 *id.* at 118-19. "[A]s all have an equal claim to the blessings of the government under which they live, and which they support, so none should be excluded from them for being of any particular denomination in religion." 2 *id.* at 119. As Reverend Daniel Shute observed: "[W]ho shall be excluded from national trusts? Whatever answer bigotry may suggest, the dictates of candor and equity, I conceive, will be, *None.*" *Id.*

Article VI's ban on religious tests, however, was not alone sufficient to ensure religious freedom to all. Antifederalists objected to the lack of a Bill of Rights, pointing out that "[t]he rights of conscience are not secured" and that "Congress may establish any religion." *See Notes on the Debates in the Pennsylvania Convention Taken by James Wilson, reprinted in Pennsylvania and the Federal Constitution, 1787-1788*, at 785 (John Bach McMaster & Frederick Dawson Stone eds., 1888). "What security," they asked, "will there be, in case the government should have in their heads a predilection for any *one* sect in religion?" *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 399 (2002) (quoting "Z," Boston Indep. Chron., Dec. 6, 1787).

These objections convinced the American people to add the First Amendment to the Constitution, prohibiting the making of any "law respecting an establishment of religion" and broadly guaranteeing the "free exercise thereof." U.S. Const. amend. I. The

First Amendment "expresses our Nation's fundamental commitment to religious liberty": the Religion Clauses were "written by the descendents of people who had come to this land precisely so that they could practice their religion freely. . . . [T]he Religion Clauses were designed to safeguard the freedom of conscience and belief that those immigrants had sought." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 881 (2005) (O'Connor, J., concurring). The "central meaning of the Religion Clauses of the First Amendment" is that "all creeds must be tolerated and none favored." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). This prohibits government from "classif[ying] citizens based on their religious views" and "singl[ing] out dissidents for opprobrium." *Galloway*, 134 S. Ct. at 1826.

As its Framers understood, the prohibition on establishment, together with the guarantee of free exercise, ensure that "[t]he Religion . . . of every man must be left to the conviction and conscience of every man," Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 *The Writings of James Madison*, *supra*, at 184, and that "opinion[s] in matters of religion . . . . shall in no wise diminish, enlarge, or affect [our] civil capacities," Thomas Jefferson, Virginia Act for Establishing Religious Freedom, ch. XXXIV (Oct. 1785), *in* 12 William Walter Hening, *The Statutes at Large, Being a Collection of All the Laws of Virginia* 84, 86 (1823). By virtue of the First Amendment's twin guarantees, "[a]ll possess alike liberty of conscience . . . . It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the

exercise of their inherent natural rights. [H]appily the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance." Letter from George Washington to the Hebrew Congregation in Newport, R.I. (Aug. 18, 1790), https://founders.archives.gov/documents/Washington/05-06-02-0135; *see Galloway*, 134 S. Ct. at 1854 (Kagan, J., dissenting) (discussing Washington's embrace of "full and equal membership in the polity for members of every religious group").

The Framers wrote the First Amendment against the backdrop of the long history of colonial establishments of religion, which used the awesome power of the state to disfavor certain religious beliefs and deny their adherents the right to freely practice their religion. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 183 (2012) ("Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church."). While not all of the colonies had religious establishments and those that did varied in important ways, the colonial religious establishments had this in common: Each used the machinery of government to discriminate against disfavored religious believers. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2115-30, 2159-69, 2177-81 (2003) (surveying colonial establishments). "Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain

dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated." *Everson v. Bd. of Educ.*, 330 U.S. 1, 10 (1947).

During the debates over the First Amendment, Madison argued that, without the Establishment Clause, "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." 1 Annals of Cong. 758 (1789) (Joseph Gales ed., 1834). To prevent such abuses, the Framers withdrew "the machinery of the State to enforce a religious orthodoxy," recognizing that "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee*, 505 U.S. at 592.

Consistent with this text and history, this Court's precedents confirm that the "clearest command of the Establishment Clause" is that "one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. Indeed, that stricture lies at the "heart of the Establishment Clause." *Kiryas Joel*, 512 U.S. at 703; *see id.* at 714 (O'Connor, J., concurring) ("[T]he government generally may not treat people differently based on the God or gods they worship, or do not worship."); *id.* at 728-29 (Kennedy, J., concurring) ("[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion."); *id.* at 729 (Kennedy, J., concurring) (the Religion Clauses forbid "religious gerrymandering"); *Galloway*, 134 S. Ct. at

1826 ("A practice that classified citizens based on their religious views would violate the Constitution."). In short, "the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community." *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring).

Free exercise principles, too, proscribe "[o]fficial action that targets religious conduct" for adverse treatment, and they require courts to "survey meticulously the circumstances of governmental categories to eliminate . . . religious gerrymanders." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)); *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2019 (2017) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 533, 542)). Similarly, discrimination by the government on the basis of religion has long been viewed as manifestly inconsistent with the basic equality guarantee that our Constitution promises to all. *See Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring) ("[T]he Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial."). These First

Amendment principles apply in the immigration context no less than in other contexts.

B. THE CONSTITUTION'S COMMAND OF RELIGIOUS NEUTRALITY SQUARELY APPLIES TO IMMIGRATION REGULATIONS.

Our Constitution's Framers understood that immigration rules could be used to entrench a religious majority and disfavor a religious minority. Madison viewed such religious establishments as an impermissible "Beacon on our Coast, warning" the "magnanimous sufferer" to "seek some other haven." Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 *The Writings of James Madison*, *supra*, at 188. The First Amendment denied the federal government the power to write this kind of religious discrimination into law.

As Madison knew well, colonial establishments had often included immigration restrictions designed to keep out persons who possessed disfavored religious beliefs, who were often thought to represent a danger to the state. *See, e.g.*, McConnell, *Establishment and Disestablishment*, *supra*, at 2180 (observing that "Americans were convinced that Roman Catholics were under a kind of spiritual submission to Rome that made them incapable of exercising the independent thought necessary to be a good republican citizen"). Although these laws had generally been swept from the books by the time of the Founding, *see* McConnell, *Origins*, *supra*, at 1436-37 (discussing disestablishment in the states), the bitter experience of living under a state-sponsored

religious orthodoxy was still fresh in the Framers' minds.

Madison's home state of Virginia had long used its immigration laws to keep out disfavored religious believers. As early as 1609, the Virginia charter provided that "none be permitted to pass in any voyage . . . but such, as first shall have taken the oath of supremacy" to the Church of England and specifically noted that "we should be loath, that any person should be permitted to pass, that we suspected to effect the superstitions of the church of Rome." Second Charter to the Treasurer and Company for Virginia, § XXIX (May 23, 1609), *in* 1 William Walter Hening, *The Statutes at Large, Being a Collection of All the Laws of Virginia* 80, 97-98 (1809).

The oath Virginia required "included recognition of the king or queen as head of the Church, thus barring non-Anglicans, and specifically repudiated belief in the Catholic doctrines of papal authority and transubstantiation." McConnell, *Establishment and Disestablishment, supra*, at 2116. "So successful was this policy that until after the Revolution, there was no Catholic Church and there were few, if any, Catholic individuals in the Commonwealth of Virginia." *Id.* at 2117. Indeed, Virginia's policy of excluding Catholics was so strict that, in 1628, "[w]hen Lord Baltimore, a Catholic, attempted to stop briefly in the Virginia Colony on his way to visit his holdings in Maryland, he was unceremoniously expelled." *Id.* at 2163.

Virginia's religious establishment also targeted Quakers for exclusion. A 1659 law enacted by the

colonial assembly imposed a "penalty of one hundred pounds" on the "master or comander of any shipp or other vessel" that brought "into this collonie any person or persons called Quakers." Grand Assembly, Mar. 13, 1659-60, Act VI, *in* 1 Hening, *supra*, at 526, 532, 533. The law required that any arriving Quakers would be "imprisoned without baile or mainprize till they do abjure this country or putt in security with all speed to depart the colonie and not to returne again." *Id.* at 533.

Other colonies, too, had religious restrictions on entry. In New England, Massachusetts Bay adopted an Act against Heresy in 1646 that provided that "no Master or Commander of any Ship . . . or other Vessel, shall henceforth bring . . . within this Jurisdiction, any known Quaker or Quakers, or any other blasphemous hereticks" on penalty of "one hundred pounds." Act of 1646: Heresie Error, *in Colonial Laws of Massachusetts* 155 (William H. Whitmore ed., 1889). Any such ship owner, if convicted, was required "to carry them backe to the place, whence he brought them." *Id.*; *see Records of the Colony or Jurisdiction of New Haven* 217 (Charles J. Hoadly ed., 1858) (1657 order that "no Quaker, Ranter, or other Herritick of that nature, be suffered to come into, nor abide in this jurisdiction").

Further to the South, a number of colonies tried to keep out Catholics. In Maryland, a 1715 law sought to "prevent too great a number of Irish Papists being imported into this province," by requiring "All Masters of Ships and Vessels, or others, importing Irish Servants into this Province" to pay a poll tax of 20 shillings "for every Irish Servant so imported." Act

of 1715, ch. XXXVI, § 7, *in* Thomas Bacon, *Laws of Maryland at Large* (1765). That apparently was not enough, because, two years later, in 1717, the legislature imposed "the additional Sum of Twenty Shillings Current Money" in order to "prevent the Growth of Popery by the Importation of too great Number of them." Act of 1717, ch. X, § 1, *in* Bacon, *supra*. In 1732, the General Assembly repealed the poll tax as applied to Irish Protestants, leaving it in full force as to Catholics. Act of 1732, ch. XXIII, *in* Bacon, *supra*.

Georgia "encouraged immigration by welcoming and tolerating a wide variety of dissenters," McConnell, *Establishment and Disestablishment*, *supra*, at 2129, but, like other jurisdictions, imposed religious restrictions on Catholics. Georgia's 1732 Charter promised "all . . . persons, except Papists, shall have a free exercise of religion." 1 *The Colonial Records of the State of Georgia* 21 (Allen D. Candler ed., 1904). "Catholics were not even permitted to live in the colony." Joel A. Nichols, *Religious Liberty in the Thirteenth Colony: Church-State Relations in Colonial and Early National Georgia*, 80 N.Y.U. L. Rev. 1693, 1711 (2005). "[T]he prohibition on Catholics was generally effective, as the largest number reported in Georgia over the first twenty years was four, in 1747." *Id.* at 1749.

Madison called religious establishments that denied an "asylum to the persecuted" based on their religion "a signal of persecution." Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 *The Writings of James Madison*, *supra*, at 188. As Madison recognized, "whilst we assert for ourselves a

freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yielded to the evidence which has convinced us." *Id.* at 186. By adding the First Amendment to the Constitution, the Framers denied the federal government the power to draw lines based on religion—including in the immigration context—in order to ensure "the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance." Letter from George Washington to the Hebrew Congregation, *supra*. The "central meaning of the Religion Clauses of the First Amendment" is that "all creeds must be tolerated and none favored." *Lee*, 505 U.S. at 590. That principle prohibits a religious test for immigration.

C. THE PROCLAMATION VIOLATES THE CENTRAL MEANING OF THE FIRST AMENDMENT.

The Proclamation establishes an impermissible religious test for immigration, as its text, history, and context demonstrate. It targets Muslims, singling out nationals from seven countries, virtually all of which are majority-Muslim. In doing so, it creates a "danger of stigma and stirred animosities" toward Muslims, *see Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring), denying them the equal dignity the Constitution affords to all, regardless of religious belief. *See* Resp'ts Br. 68-72.

It is irrelevant that the Proclamation does not mention Muslims by name. "Facial neutrality is not determinative. The Free Exercise Clause, like the

Establishment Clause, extends beyond facial discrimination." *Church of the Lukumi Babalu, Inc.*, 508 U.S. at 534; *Kiryas Joel*, 512 U.S. at 699 ("[O]ur analysis does not end with the text of the statute at issue."). Context matters, *see McCreary*, 545 U.S. at 861-62; *Kiryas Joel*, 512 U.S. at 699, and the textual and contextual evidence that the Proclamation singles out and stigmatizes Muslims is overwhelming. The Proclamation is shot through with animus against Muslims on account of their religion. Indeed, that is why the Government urges this Court to ignore this powerful evidence, insisting that it would be improper to "prob[e] . . . the Chief Executive's supposed subjective views." Pet'rs Br. 67. But "purpose needs to be taken seriously under the Establishment Clause," and therefore this Court must take account of "the history of the government's actions," not "turn a blind eye to the context in which [the] policy arose." *McCreary*, 545 U.S. at 874, 866 (citation omitted).

Likewise, it does not matter that the Proclamation does not apply to all Muslims. *See Kiryas Joel*, 512 U.S. at 705 ("Here the benefit flows only to a single sect [of a religion]. but aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole."). The Proclamation's terms, which apply almost exclusively to Muslim-majority nations, are based on religious hostility to Muslims.

There is no legitimate purpose—independent of religious animus—for the Proclamation's sweeping, gerrymandered prohibitions. There is no evidence to

suggest that broadly excluding individuals from those countries bears any rational relationship to protecting Americans from terrorist attacks. Indeed, not a single American has been killed as a result of terrorist attacks on U.S. soil carried out by individuals born in those countries since at least 1975. Alex Nowrasteh, *Guide to Trump's Executive Order To Limit Migration for "National Security" Reasons*, Cato Inst.: Cato at Liberty (Jan. 26, 2017), https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons; *see id.* ("[T]he countries that Trump chose to temporarily ban are not serious terrorism risks."). Indeed, the government's own evidence demonstrates that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." J.A. 244.

Even under a more limited form of judicial review, *see Fiallo v. Bell*, 430 U.S. 787 (1977), the Proclamation is inconsistent with the principles of religious freedom enshrined in our Constitution. "Our deference in matters of policy cannot . . . become abdication in matters of law." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012). Respect for the powers of the President "can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed." *Id.* In immigration, as in other areas, when other branches of government transgress constitutional boundaries, "the judicial department is a constitutional check." 2 *Elliot's Debates* 196. Because the Proclamation transgresses "important constitutional limitations," *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001), it must be invalidated.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

PETER KARANJIA
GEOFFREY BROUNELL
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., NW, Suite 800
Washington, D.C. 20006
(202) 973-4256
peterkaranjia@dwt.com

ELIZABETH B. WYDRA
BRIANNE J. GOROD
Counsel of Record
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street, NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Victor A. Kovner
DAVIS WRIGHT TREMAINE LLP
1251 Avenue of the Americas, 21st Floor
New York, NY 20020

RAYMOND H. BRESCIA
Professor of Law*
ALBANY LAW SCHOOL
80 New Scotland Ave.
Albany, NY 12208
*For affiliation purposes only[6]

Counsel for Amici Curiae

March 2018

---

[6] Counsel for *amici* are grateful for the valuable contributions to this brief of Davis Wright Tremaine summer associate Katherine K. Moy, and Professor Brescia's students (Andrew Carpenter, Elyssa Klein, Mary Ann Krisa, Graham Molho, and Gloria Sprague).

APPENDIX:
LIST OF *AMICI*

U.S. Senate

Dianne Feinstein
Senator of California

Patrick J. Leahy
Senator of Vermont

Richard J. Durbin
Senator of Illinois

Sheldon Whitehouse
Senator of Rhode Island

Amy Klobuchar
Senator of Minnesota

Christopher A. Coons
Senator of Delaware

Richard Blumenthal
Senator of Connecticut

Mazie K. Hirono
Senator of Hawai'i

Cory A. Booker
Senator of New Jersey

Kamala D. Harris
Senator of California

LIST OF *AMICI* - cont'd

Tammy Baldwin
Senator of Wisconsin

Michael F. Bennet
Senator of Colorado

Sherrod Brown
Senator of Ohio

Benjamin L. Cardin
Senator of Maryland

Thomas R. Carper
Senator of Delaware

Tammy Duckworth
Senator of Illinois

Margaret Wood Hassan
Senator of New Hampshire

Tim Kaine
Senator of Virginia

Edward J. Markey
Senator of Massachusetts

Robert Menendez
Senator of New Jersey

Jeff Merkley
Senator of Oregon

LIST OF *AMICI* - cont'd

Patty Murray
Senator of Washington

Jack Reed
Senator of Rhode Island

Bernard Sanders
Senator of Vermont

Brian Schatz
Senator of Hawai'i

Charles E. Schumer
Senator of New York

Jeanne Shaheen
Senator of New Hampshire

Tina Smith
Senator of Minnesota

Chris Van Hollen
Senator of Maryland

Elizabeth Warren
Senator of Massachusetts

Ron Wyden
Senator of Oregon

LIST OF *AMICI* - cont'd

U.S. House of Representatives

Jerrold Nadler
Representative of New York

Zoe Lofgren
Representative of California

Sheila Jackson Lee
Representative of Texas

Henry C. "Hank" Johnson, Jr.
Representative of Georgia

Theodore E. Deutch
Representative of Florida

Luis V. Gutiérrez
Representative of Illinois

Karen Bass
Representative of California

Cedric L. Richmond
Representative of Louisiana

David N. Cicilline
Representative of Rhode Island

Eric Swalwell
Representative of California

LIST OF *AMICI* - cont'd

Ted W. Lieu
Representative of California

Jamie Raskin
Representative of Maryland

Pramila Jayapal
Representative of Washington

Val Butler Demings
Representative of Florida

Alma S. Adams, Ph.D.
Representative of North Carolina

Donald S. Beyer, Jr.
Representative of Virginia

Earl Blumenauer
Representative of Oregon

Julia Brownley
Representative of California

Brendan F. Boyle
Representative of Pennsylvania

Michael E. Capuano
Representative of Massachusetts

Salud O. Carbajal
Representative of California

LIST OF *AMICI* - cont'd

Tony Cárdenas
Representative of California

André Carson
Representative of Indiana

Joaquin Castro
Representative of Texas

Judy Chu
Representative of California

Katherine M. Clark
Representative of Massachusetts

Yvette D. Clarke
Representative of New York

W. M. Lacy Clay
Representative of Missouri

Jim Cooper
Representative of Tennessee

Joe Courtney
Representative of Connecticut

Joseph Crowley
Representative of New York

Elijah E. Cummings
Representative of Maryland

LIST OF *AMICI* - cont'd

Peter A. DeFazio
Representative of Oregon

Diana DeGette
Representative of Colorado

Mark DeSaulnier
Representative of California

Debbie Dingell
Representative of Michigan

Keith Ellison
Representative of Minnesota

Eliot L. Engel
Representative of New York

Anna G. Eshoo
Representative of California

Adriano Espaillat
Representative of New York

Dwight Evans
Representative of Pennsylvania

Lois Frankel
Representative of Florida

Tulsi Gabbard
Representative of Hawai'i

LIST OF *AMICI* - cont'd

Jimmy Gomez
Representative of California

Al Green
Representative of Texas

Gene Green
Representative of Texas

Raúl M. Grijalva
Representative of Arizona

Alcee L. Hastings
Representative of Florida

Brian Higgins
Representative of New York

Jared Huffman
Representative of California

William R. Keating
Representative of Massachusetts

Robin L. Kelly
Representative of Illinois

Daniel T. Kildee
Representative of Michigan

Ro Khanna
Representative of California

LIST OF *AMICI* - cont'd

Ruben J. Kihuen
Representative of Nevada

Derek Kilmer
Representative of Washington

Ron Kind
Representative of Wisconsin

Brenda L. Lawrence
Representative of Michigan

Barbara Lee
Representative of California

Sander M. Levin
Representative of Michigan

John Lewis
Representative of Georgia

Alan Lowenthal
Representative of California

Nita M. Lowey
Representative of New York

Stephen F. Lynch
Representative of Massachusetts

Carolyn B. Maloney
Representative of New York

LIST OF *AMICI* - cont'd

Doris O. Matsui
Representative of California

Betty McCollum
Representative of Minnesota

A. Donald McEachin
Representative of Virginia

James P. McGovern
Representative of Massachusetts

Gregory W. Meeks
Representative of New York

Grace Meng
Representative of New York

Seth Moulton
Representative of Massachusetts

Grace F. Napolitano
Representative of California

Richard M. Nolan
Representative of Minnesota

Donald Norcross
Representative of New Jersey

Eleanor Holmes Norton
Representative of District of Columbia

LIST OF *AMICI* - cont'd

Beto O'Rourke
Representative of Texas

Frank Pallone, Jr.
Representative of New Jersey

Donald M. Payne, Jr.
Representative of New Jersey

Nancy Pelosi
Representative of California

Ed Perlmutter
Representative of Colorado

Scott H. Peters
Representative of California

Chellie Pingree
Representative of Maine

Jared Polis
Representative of Colorado

David E. Price
Representative of North Carolina

Mike Quigley
Representative of Illinois

Lucille Roybal-Allard
Representative of California

LIST OF *AMICI* - cont'd

Gregorio Kilili Camacho Sablan
Representative of the Northern Mariana Islands

Linda T. Sánchez
Representative of California

Jan Schakowsky
Representative of Illinois

Adam B. Schiff
Representative of California

Robert C. "Bobby" Scott
Representative of Virginia

José E. Serrano
Representative of New York

Brad Sherman
Representative of California

Albio Sires
Representative of New Jersey

Adam Smith
Representative of Washington

Darren Soto
Representative of Florida

Jackie Speier
Representative of California

LIST OF *AMICI* - cont'd

Mark Takano
Representative of California

Bennie G. Thompson
Representative of Mississippi

Dina Titus
Representative of Nevada

Norma J. Torres
Representative of California

Niki Tsongas
Representative of Massachusetts

Juan Vargas
Representative of California

Filemon Vela
Representative of Texas

Nydia Velázquez
Representative of New York

Debbie Wasserman Schultz
Representative of Florida

Maxine Waters
Representative of California

Bonnie Watson Coleman
Representative of New Jersey

LIST OF *AMICI* - cont'd

Peter Welch
Representative of Vermont

Frederica S. Wilson
Representative of Florida

John A. Yarmuth
Representative of Kentucky